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No. 1226

Supreme Court of the United States

OCTOBER TERM, 1968

GREENWOOD MUNICIPAL SEPARATE SCHOOL DISTRICT, ET. AL.,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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INDEX

	Page
Citations to opinions delivered in the court below	1
Jurisdiction	2
Questions presented for review	2
Constitutional provisions and statutes which this case involves	4
Statement of the case	5
Argument	
1. The Attorney General had no right to bring or maintain this suit and the same should have been dismissed	9
2. The Court of Appeals erred in permitting the Respondent on appeal to assign as error the granting by the District Court of Respondent's own motion	11
3. The judgment of the District Court approving an attendance zone for the Bankston Elementary School should have been affirmed	15
4. Teacher desegregation	21

INDEX TO APPENDIX

Appendix A.	
Opinion, judgment and order on petition for rehearing of the United States Court of Appeals for the Fifth Circuit	27
Appendix B.	
Memorandum opinion and order of February 7, 1967 of U. S. District Court	44
Appendix C.	
Letter opinion of September 1, 1967, of U. S. District Court	49

Page

Appendix D.
42 U. S. C. 2000c-6 ——— 53

Appendix E.
Sections 6282-07 and 6282-13 of Mississippi Code of 1942 ——— 55

Appendix F.
Amendment XIV to United States Constitution — 57

TABLE OF AUTHORITIES

Cases:

Alston vs. School Board (4th Cir.), 112 F. 2d 992 ——— 22
Bell vs. School City of Gary, Ind. (7th Cir.), 324 Fed. 2d 209 (certiorari denied 377 U. S. 924, 12 L. Ed. 2d 216) ——— 19
Brown vs. Board of Education of Topeka, 139 F. Supp. 468 ——— 18
Brown et al. vs. Board of Education, 349 U. S. 294, 75 S. Ct. 293, 99 L. Ed. 1083 ——— 18
Deal vs. Cincinnati Board of Education (6th Cir.) 369 Fed. 2d 55 ——— 19
Downs vs. Board of Education of Kansas City (10th Cir.), 336 F. 2d 988 (certiorari denied 380 U. S. 914, 13 L. Ed. 2d 800) ——— 19
Gibson vs. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075 ——— 22
Gilliam vs. School Board of the City of Hopewell, Virginia (4th Cir.) 345 Fed. 2d 325 ——— 19
Green vs. County School Board of New Kent County, 88 S. Ct. 1689 ——— 13
Kerr, et al. vs. Enoch Pratt Free Library of Baltimore City, et al. (4th Cir.), 149 F. 2d 212 — 22
Mercelis et al. vs. Wilson, et al., 235 U. S. 579 59 L. Ed. 370, 35 S. Ct. 150 ——— 12
Monroe vs. Board of Commissioners of the City of Jackson, 88 S. Ct. 1701 ——— 14
New York Elevator Company vs. Fifth National Bank, 135 U. S. 432, 10 S. Ct. 743, 34 L. Ed. 231 ——— 12

Page

Seward, et al. vs. Comaeau, Sheriff, et al., 154 U. S. 665, 26 L. Ed. 438, 14 S. Ct. 1209 ____ 12
U. S. ex rel. Brown vs. Memphis, 97 U. S. 284, 24 L. Ed. 937 ____ 12
U. S. vs. St. Louis and M. Valley Transport Company, 184 U. S. 247, 22 S. Ct. 350, 46 L. Ed. 520 ____ 12
United States vs. Jefferson County Board of Education, 380 F. 2d 385 ____ 7, 20

Constitutional provision:

Fourteenth Amendment to U. S. Constitution ____ 4, 5, 57

Statutes:

42 U.S.C. 2000c-6 (a) and (b) ____ 4, 53
28 U.S.C. 1345 ____ 5
42 U.S.C. 2000c (b), 2000c-6 (a) and 2000c-9 ____ 5, 20
Sections 6282-07 and 6282-13 of Mississippi Code of 1942 ____ 5, 55

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Your petitioners, Greenwood Municipal Separate School District, a school district organized under the laws of the State of Mississippi, its Superintendent, Dr. W. B. Dribben, its Assistant Superintendent, W. O. Benjamin, and the members of its Board of Trustees, petition that a writ of certiorari be issued to review the final judgment rendered by the United States Court of Appeals For The Fifth Circuit in cause numbered 25,714 on its docket styled "United States of America vs. Greenwood Municipal Separate School District et al."

CITATIONS TO OPINIONS DELIVERED IN THE COURTS BELOW

1. The opinion of the United States Court of Appeals For the Fifth Circuit in this case is not officially reported as yet. It appears as Appendix A hereto, and at

pages 504 through 521 of the certified transcript of the record filed herewith. The judgment of the Court of Appeals and its Order Denying Rehearing also appear in Appendix A hereto.

2. The opinions of the United States District Court For the Greenville Division of the Northern District of Mississippi in this case are not officially reported.

The Memorandum Opinion And Order of the District Court of February 7, 1967, appears as Appendix B hereto and also at pages 178 through 185 of the certified transcript of the record filed herein.

The letter opinion of the District Court dated September 1, 1967, appears as Appendix C hereto and also at pages 420 through 424 of the certified transcript of the record herein.

JURISDICTION

The judgment of the United States Court of Appeals For the Fifth Circuit in this case was dated and entered February 4, 1969.

The order of the United States Court of Appeals for the Fifth Circuit denying the Petition for Rehearing filed by these Petitioners was dated and entered March 5, 1969.

The jurisdiction of this Court to review the judgment herein is conferred by 28 USC section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are whether or not the Court of Appeals erred in the following:

1. In holding that the Respondent had the right to file and maintain this suit and that it should not be dismissed, although the Respondent through the Attorney General of the United States had not given Petitioners

"a reasonable time to adjust the conditions alleged" in the complaints to him as required by 42 U. S. C. 2000c-6 (Civil Rights Act of 1964) as a condition precedent to his right to file and maintain the suit in that the Attorney General refused to tell Petitioners what the conditions were.

2. In permitting the Respondent in the Court of Appeals to successfully assign as error the granting by the District Court of Respondent's own motion, thereby permitting the Respondent on appeal to have set aside and vacated the freedom of choice desegregation plan for Petitioner school district which had been ordered by the District Court in this case on the motion of Respondent.

3. In holding that on the remand of this case to the District Court a freedom of choice desegregation plan is foreclosed and Petitioners will be required to adopt a different type of plan.

4. In not affirming the judgment of the United States District Court approving a geographic attendance zone for Petitioner's Kathleen Bankston Elementary School.

5. In holding that Petitioners must hire Negro teachers on account of their race and color to teach at the Kathleen Bankston Elementary School, although it has an all-white student body as a result of a de facto housing pattern; and in thus requiring Petitioners to discriminate against the present white teachers at this Bankston Elementary School because they are white and to discriminate in favor of Negroes because of their race and color.

6. In requiring Petitioners to abandon their present policy that race or color shall not be a factor in the employment, re-employment, hiring, re-hiring, promotion, demotion, or dismissal of teachers, but instead to discriminate against Negro teachers in some schools on account of their race and color by hiring in their places white teachers merely because they are white, and in other

schools to discriminate against the white teachers therein on account of their race and color and to hire in their places Negro teachers merely because they are Negroes.

7. By requiring Petitioners to hire teachers on account of their race and color to teach at certain schools even though Petitioners have no qualified applicants for teaching positions at those schools of the required race or color and even though Petitioners have no applications to teach at those schools from any persons, either qualified or unqualified, of the race and color prescribed by the Court of Appeals.

8. In holding Petitioners must withhold approval of contracts with teachers if this is necessary to place an unstated number of Negro teachers in some schools and an unstated number of white teachers in other schools.

9. In requiring Petitioners to breach lawful contracts with the teachers in its system by attempting to transfer them from schools where they have contracted to teach to schools where they have not, and will not, contract to teach and to which Petitioners have no power, either legal or illegal, to transfer them.

10. In requiring Petitioners to violate the equal protection clause of the fourteenth amendment to the federal constitution by discriminating against teachers and applicants for teaching employment on account of their race and color and thereby deprive teachers and applicants of their right under the fourteenth amendment not to be discriminated against by the state on account of their race or color.

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVES

1. 42 U. S. C. 2000c-6, which is set out in Appendix D hereto.

2. Sections 7 and 13 of Chapter 20 of the Laws of Mississippi of Extraordinary Session of 1953, which ap-

pear as Sections 6282-07 and 6282-13 in the Mississippi Code of 1942, and which statutes are set out as Appendix E hereto.

3. 42 U. S. C. 2000c (b), 2000c-6(a) and 2000c-9, which are set out in the body of this petition.

4. Fourteenth Amendment to the Federal Constitution which is set out in Appendix F hereto.

STATEMENT OF THE CASE

On August 1, 1966, the Respondent by the Attorney General of the United States instituted this suit under Section 407(a) and (b) of the Civil Rights Act of 1964 (which is 42 U. S. C. 2000c-6 (a) and (b)) and under 28 U. S. C. 1345 against petitioners for an order to enjoin them from maintaining a dual system based upon race or color and requiring them to operate their school system under certain provisions, including a freedom of choice method of desegregation. (R. 7-34)

Petitioners challenged the right of the Attorney General to institute and maintain this suit in the name of Respondent in three pleadings:

(1) A motion with affidavit attached to require Respondent under Rule 34 of the Rules of Civil Procedure to permit Petitioners to inspect and copy the written complaints referred to in the certificate of the Attorney General attached to the complaint as having been received by him and as having been signed by parents of minor children, "alleging in effect that said children are being deprived" by Petitioner "of the equal protection of the laws" (R. 34-9). Among other things, the affidavit attached to this motion alleges that no child had made application and been denied by reason of race, etc., the right to attend any school of Petitioners' district, that Petitioners believe the complaints received by the Attorney General are without merit and they can so show

if permitted to inspect the complaints, that Petitioners cannot adequately prepare their defense without this information, that the right of Respondent to bring and maintain this suit is dependent upon said alleged complaints and inspection is necessary to determine whether Respondent can maintain the action, and that the complaints contain evidence and information that will reasonably lead to the discovery of other evidence.

2. Interrogatories to Respondent under Rule 33 of the Rules of Civil Procedure to elicit the identity of the persons who signed the complaint, the identity of the children who allegedly are being deprived by Petitioners of the equal protection of the law, and the exact language in the written complaints on which the Attorney General based his conclusion that said complaints allege "in effect" that the children referred to in the complaints "are being deprived of the equal protection of the laws". (R. 39-41); and

3. Petitioners also filed an answer (R. 48-59), which, among other things, specifically denied that Petitioners had denied or deprived any person of the equal protection of the laws; denied that the Attorney General had the right to file and maintain this action because he had not received the written complaints required by Section 407 of the Civil Rights Act of 1964 as a condition precedent to Respondent's filing and maintaining this action; and that, since the Attorney General refused to give Petitioners the alleged facts in the complaints on which the Attorney General based his conclusion that the complaints alleged "in effect" that unnamed children were being deprived of the equal protection of the laws, the Petitioners were not given, as required by Section 407 (a) of the Civil Rights Act (42 U. S. C. 2000c-6 (a)), "a reasonable time to adjust the conditions alleged in such complaint". (Fourth Defense p. 49)

The District Court denied Petitioner's motion to produce, sustained Respondent's objections to all of the in-

terrogatories, and permitted the Attorney General to maintain the suit. (R. 62-4)

On August 26, 1966, the District Court issued a preliminary injunction which, among other things, required Petitioners not later than August 31, 1966, to file a desegregation plan (R. 65-6). The Petitioners then submitted a plan for a geographic attendance zone for the Kathleen Bankston Elementary School and a freedom of choice plan for its other schools. Respondent made eight objections to this plan, including an objection that the Bandston Elementary School should also be placed under the freedom of choice plan (R. 100-2). On September 2, 1966, the District Court entered an order amending Petitioner's plan, giving interim approval for one semester to the geographic attendance zone of the Bankston Elementary School, and approving the remainder of the plan as amended by the Court (R. 111-6).

On January 20, 1967, Respondent filed a motion for an order to invalidate the geographic attendance zone of the Bankston Elementary School and to require it to come under the existing freedom of choice plan applicable to Petitioner's other schools. (R. 117-8). A hearing was had on this motion (R. 119-185), resulting in an order of February 7, 1967, approving this attendance zone for the remainder of the school year 1966-7, but reserving final disposition of the question until after briefs had been filed. (R. 178-185). This attendance zone was given final approval by the District Court's order of September 12, 1967 (R. 425).

After the decision of the Court of Appeals For The Fifth Circuit in United States vs. Jefferson County Board of Education, 380 F. 2d 385, the Respondent on April 6, 1967, filed a motion to substitute the so-called model Jefferson freedom of choice desegregation plan in the place of the freedom of choice desegregation plan then in effect in Petitioner's school district, and a copy of the proposed Jefferson freedom of choice desegregation plan was

attached to the motion. (R. 185-205) The only ground for relief alleged in the motion was the allegation that in the Jefferson case the Court of Appeals had directed that this model freedom of choice desegregation plan be entered in school districts throughout the Fifth Circuit.

Petitioners filed two pleadings to this motion to substitute the Jefferson plan for the plan then in effect:

1. A motion to dismiss without a hearing on the ground, among others, that as Petitioners are complying with the court ordered desegregation plan under which all of their grades have been desegregated and are not denying the equal protection of the laws to anyone and as the Respondent's motion fails to allege that Petitioners are violating the equal protection of the laws clause, the Respondent's motion fails to state a claim upon which relief can be granted. (R. 206-13) and

2. A response to Respondent's motion in which the principal defense pled was that Petitioners were operating the school district in accordance with a plan approved by the Court which, among other things, provides for the desegregation of all grades of its schools and provides that race shall not be a factor in the hiring, assignment, reassignment, etc., of teachers or other professional staff members; that in operating its school system under this plan the Petitioners are not violating the equal protection clause; that the school system does not belong to the Respondent but belongs to the Petitioners who have a right to operate it as they see fit so long as they do not violate the Federal Constitution; that the only right Respondent has under Section 407 of the Civil Rights Act or under anything else is the right to relief to prevent Petitioners from denying the equal protection of the laws to anyone; and that since Petitioners are not violating the equal protection clause and the Respondent does not allege that they are violating it, the Respondent is not entitled to any relief and is not entitled to set aside constitutionally valid rules governing Petitioner's

school district and substitute therefor rules preferred by Respondent. (R. 213-7)

Although Respondent had alleged no ground for relief except the rendition of the Jefferson decision, the Court, over the objection of Petitioners, ruled that Respondent would not have to put on any evidence (R. 282-3), and the Respondent did not introduce any evidence to show it was entitled to any of the relief requested.

After a hearing (R. 218-424), the Court by order rendered September 12, 1967, (R. 424-45) put into effect the freedom of choice plan requested by Respondent with certain minor changes required by the evidence. (R. 187-205)

Respondent then prosecuted an appeal to the Court of Appeals For the Fifth Circuit and there successfully assigned as error the granting of its own motion to install the Jefferson freedom of choice plan.

The facts with reference to the Bankston geographic school zone and those with reference to the teacher desegregation questions are stated under appropriate headings in the argument herein.

ARGUMENT

1. The Attorney General Had No Right to Bring or Maintain This Suit and the Same Should Have Been Dismissed.

Prior to the Civil Rights Act of 1964, the Respondent had no right to file or maintain this suit, and the only such right given by the Civil Rights Act is the provision of 42 U. S. C. 2000c-6 which gives the Attorney General the right to institute the suit when he receives a written complaint signed by a parent or parents to the effect that their children as members of a class of persons similarly situated are being deprived by a School Board of the equal protection of the laws, provided, among other things,

the Attorney General first gives notice of this complaint to the appropriate school board and is satisfied that such board has had a reasonable time to adjust the conditions alleged in such complaint.

By this statute, Congress very wisely made it a condition precedent to the right to file and maintain the suit that the Attorney General first give notice to the school board of the conditions alleged in such complaint on which is based the conclusion that children "are being deprived by a school board of the equal protection of the laws" and that the school board be given a reasonable time to adjust such conditions. It was obviously the intent of Congress that school boards should be given an opportunity to avoid expensive and protracted litigation by voluntarily adjusting the conditions complained of.

In order to "adjust the conditions" a school board certainly needs to be told what the conditions are which it will have to adjust in order to avoid suit, and it was for that reason the statute requires the Attorney General to give such notice before filing suit.

In this case the only evidence in the record bearing on the question of whether Petitioners were given any time to adjust the conditions is the evidence that the Attorney General refused to tell Petitioners what the conditions were, and that when Petitioners sought this information by interrogatories and also by Motion to Produce, the Attorney General successfully resisted these attempts and thereby purposely kept the Petitioners from learning what the conditions were. In the case at bar the Attorney General even refused to answer interrogatory number 3 (R. 40) which merely asked for the language in the alleged complaints on which the Attorney General based his conclusion that the complaints allege "in effect" that children "are being deprived by Greenwood Municipal Separate School District of the equal protection of the laws."

We realize that from the history of the legislation it can be argued that it was not intended the Attorney General should be required to disclose the names of the complainants or to prove his conclusions that these complainants were unable to initiate and maintain appropriate legal proceedings; but we cannot think of any reason even approaching soundness why the Attorney General should be permitted to violate Rule 33 by withholding from Petitioners the conditions which the Civil Rights Act gave Petitioners the right to know and adjust and thereby avoid the suit. With deference, it appears from the act itself that it was the intent of Congress that the Attorney General could not institute and maintain suits of this kind until he had first given the school boards notice of the complained of conditions and a reasonable time to adjust these conditions and thus avoid the suit.

In this case the Respondent failed to prove, and, indeed refused to prove or disclose, any right to file and maintain this suit; and the same should have been dismissed.

As far as we have been able to find, the opinion of the Court of Appeals in the case at bar is the only decision on this important question of federal law, and we submit it is important both to this case and to future school litigation all over the United States that this question be settled by this Court.

2. The Court of Appeals Erred in Permitting the Respondent on Appeal to Assign as Error the Granting by the District Court of Respondent's Own Motion.

The Respondents appealed to the Court of Appeals from the judgment which the District Court rendered September 12, 1967, on the basis of two evidentiary hearings held by the District Court in the year 1967. One of these hearings was on the motion of Respondent to vacate the geographic attendance zone for the Bankston Elementary School and install in its place the freedom of choice plan

applicable to Petitioner's other schools. The other hearing was on a motion of Respondent in which the only relief requested by Respondent in the District Court was entering a Jefferson type freedom of choice desegregation plan. The Respondent obtained this relief but was then permitted in the Court of Appeals to argue successfully that the freedom of choice plan installed on Respondent's own motion was invalid and that these petitioners should be required to zone or pair their schools.

It is well settled horn-book law that a party cannot complain in the appellate court of an error which he invited, and that an appellant may not put the lower court in error for doing what the appellant invited the court to do.

As stated by this Court in Mercelis et al vs. Wilson, et al., 235 U. S. 579, 59 L. Ed. 370, 35 S. Ct. 150:

> "The defendants did not appeal, and the appellants cannot be heard to complain of the Court's action in granting their own motion."

To the same effect are the following cases decided by this Court: Seward, et al. vs. Comaeau, Sheriff, et al., 154 U. S. 665, 26 L. Ed. 438, 14 S. Ct. 1209; New York Elevator Company vs. Fifth National Bank, 135 U. S. 432, 10 S. Ct. 743, 34 L. Ed. 231; U. S., ex rel Brown vs. Memphis, 97 U. S. 284, 24 L. Ed. 937; U. S. vs. St. Louis and M. Valley Transport Company, 184 U. S. 247, 22 S. Ct. 350, 46 L. Ed. 520.

The opinion of the Court of Appeals in the case at bar is the only authority we can find to support the proposition that appellants can successfully complain on appeal of the granting of their own motions by the trial court; and in that respect the opinion of the Court of Appeals in the case at bar is contrary to all of the decisions of this Court on this point.

The case at bar is a good illustration of the unfair and bad results which may flow from such a disregard of settled principles of legal procedure.

First, such an important decision as the invalidating of a freedom of choice plan for operating petitioner's school district should not be made without first giving petitioners the right to be heard thereon by introducing evidence on the point; and this right has not been had by petitioners because in the District Court the issues, and therefore the evidence, were restricted by Respondent's motions to the matter of substituting freedom of choice for the Bankston zone and to the matter of substituting the Jefferson freedom of choice plan for the freedom of choice plan already in effect in the other schools of the district.

Second, in its decision in the case at bar the Court of Appeals has invalidated all freedom of choice plans for petitioner's school district on the basis of evidentiary hearings in 1967 in which this was not an issue; and therefore, under the Court of Appeals' opinion, on remand to the District Court that court will be precluded from hearing evidence that freedom of choice is working in petitioner's schools and will be precluded from doing what this Court in Green vs. County School Board of New Kent County, 88 S. Ct. 1689, said the District Court should do, namely:

> "There is no universal answer to complex problems of desegregation; there is obviously no one plan that could do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance."

The circumstances present and the options available are not in this record. They were neither adduced nor attempted to be adduced in the 1967 District Court hearings because this was not an issue being tried in the District Court.

It is certain that Petitioners' freedom of choice period for its 1969-1970 session will be held before the case at

bar is again tried in the District Court, and yet, even if that freedom of choice period results in so much integration in Petitioner's schools as to make it obvious at the time of trial that freedom of choice promises realistically to work now, the opinion of the Court of Appeals herein, based on a factual trial in 1967 in which this was not an issue, will preclude the District Court from hearing evidence that freedom of choice is working in Petitioner's schools. It will preclude the District Court from assessing the matter in the light of the circumstances then present.

Petitioners, of course, do not complain of the Court of Appeals' decision that on remand the proceedings must be controlled by the Green case, by Monroe vs. Board of Commissioners of the City of Jackson, 88 S. Ct. 1701, Raney vs. Board of Education of Gould School District, 88 S. Ct. 1697, "as well as recent Fifth Circuit decisions". This is a fact, just as it is also a fact that on remand the proceedings must be controlled also by any applicable decisions which may hereafter and before trial be rendered by this Court and the Court of Appeals. We do, however, with deference, take issue with the Court of Appeals, in its own words, "going a step further" and holding herein "that these recent decisions foreclose the use of freedom of choice in Greenwood . . ."

Even though this is a Mississippi school case we submit the following things done in this case should be rectified:

First, the Attorney General has disregarded a statute of the United States by filing and maintaining this suit without first giving, and indeed refusing to give, Petitioners an opportunity to correct any improper conditions.

And then, after the suit was filed and these Petitioners sought to learn these conditions by an interrogatory, the Attorney General was permitted in plain disregard of Rule 33 of the Federal Rules of Civil Procedure to refuse to give these conditions to the Petitioners.

Next, the Attorney General was permitted in this case to set aside in toto the provisions of petitioners' court approved desegregation freedom of choice desegregation plan and in its place to substitute the provisions of the Jefferson freedom of choice plan for no reason except that the Attorney General preferred this new plan to the existing plan adopted by petitioners with the approval of the Court. The Attorney General was permitted to do this without alleging that any provision of the existing plan was invalid or that petitioners were denying the equal protection of the laws to anyone and without offering any evidence of any kind; and he was permitted to do this even though petitioner's own the School District and have the right to operate it under any lawful regulations which they desire so long as they do not violate the Federal Constitution and even though the only right that the Attorney General has is that given him by the Civil Rights Act of 1964 for appropriate relief where children are being deprived by a school board of the equal protection of the laws.

And then, after installing the Jefferson freedom of choice plan without evidence and without even an allegation that petitioners were depriving anyone of the equal protection of the laws, the Attorney General was permitted on appeal to argue and have set aside the very Jefferson freedom of choice plan which he had sought and succeeded in the trial court in having installed over the objections of these petitioners.

3. The Judgment of the District Court Approving an Attendance Zone for the Bankston Elementary School Should Have Been Affirmed.

The facts with reference to the geographic attendance zone of the Kathleen Bankston Elementary School are contained in the stipulation and testimony from page 119 through page 178 of the record. On the basis of these undisputed facts the District Court stated and held that

"the Bankston School geographic attendance zone is, as this Court believes, as natural an area for such a zone as could be found." (R. 179)

The Bankston zone consists of all the school district lying north of the Yazoo River, and all grammar school children who live north of this river are required to attend the Bankston school.

The undisputed evidence shows these facts:

The Yazoo River flows through Greenwood and forms the northern boundary of the town's business district. The residential area north of the Yazoo River is connected to the larger portion of the town lying south of the River by two heavily-travelled bridges and the southern terminus of each of these two bridges is in the business district.

That part of petitioners' school district lying north of the Yazoo River is bounded on the south by the Yazoo River, on the north by the Tallahatchie River, and on the east by the city limit line north of the Yazoo River, and on the west by the city limit line north of the Yazoo River.

The school district operates nine schools. Eight of these schools, including four grammar schools, are located south of the Yazoo River. The only school north of the Yazoo River is the Bankston Elementary School which is located near the Tallahatchie River at the north boundary of the school district.

This grammar school and the additions to it were planned and built to serve the needs of the growing residential district north of the Yazoo River; and it is not practical for it to serve any children except those residing north of the Yazoo River. In order to get to this school, any child residing south of the Yazoo River would necessarily have to traverse the business district of Greenwood, would then have to cross the Yazoo River on one of the two heavily-travelled bridges whose southern terminus is in the business district, thereby adding to the conges-

tion on these bridges, and would then have to travel approximately one mile to the Bankston School.

There is no necessity for students residing south of the Yazoo River to attend Bankston School because they are adequately served by four elementary schools located south of the Yazoo River and they can attend any one of them under the freedom of choice plan in effect.

This geographic zone for the Bankston School was established prior to 1950 at a time when integration and desegregation were not problems, and it was admittedly established for obviously valid administrative reasons and without thought of race.

The only reason advanced for not affirming the order of the District Court approving this geographic attendance zone for one elementary school is that at present there are no Negro children of elementary school age residing in the zone. It is obvious, however, that the zone was not gerrymandered or created for the purpose of including students of only one race. Because of the probably unique combination of the location of the Bankston School and the surrounding geography, any school administrator would be forced to handle this school on a zone basis, just as did petitioners beginning in some year prior to 1950. Even if it was permissible to gerrymander a zone for this elementary school for the sole purpose of including Negroes therein, the peculiar geography involved would make it impossible to do so in any way even approaching administrative sense.

Petitioners are here forced to deal with a de facto neighborhood situation caused by housing patterns over which neither the petitioners, the State of Mississippi, nor its governmental sub-divisions, nor the Federal Courts have any control. The sole question is therefore whether a zone for an elementary school drawn without reference to race in a manner made imperative by sensible school administration is unconstitutional for the sole reason that

Negroes of elementary school age have not yet chosen to reside in this zone.

As stated in Brown et al. v. Board of Education, 349 U. S. 294, 75 S. Ct. 293, 99 L. Ed. 1083:

> "School authorities have the primary responsibility of elucidating, assessing, and solving these problems; Courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

And in that case this Court authorized the district courts to consider, among other things, "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve the system of determining admission to the public schools on a nonracial basis. . . ."

It is our understanding of the case law that if, as here, an attendance zone is created in good faith without gerrymandering and with boundaries set for good school administrative reasons, then the School Board will have sustained its constitutional obligation without regard to the racial makeup of the resulting student bodies.

This principle was stated in Brown vs. Board of Education of Topeka, 139 F. Supp. 468, after it had been remanded to the trial court in Brown v. Board of Education. In this case the Court said:

> "It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them there is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.
>
> "If it is a fact, as we understand it is, without respect to Buchanan School that the district is inhabited

entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live."

In Bell vs. School City of Gary, Ind. (7th Cir.), 324 Fed. 2d 209 (certiorari denied 377 U. S. 924, 12 L. Ed. 2d 216), the Court stated and held:

> "Plaintiffs argue that Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, proclaims that segregated public education is incompatible with the requirements of the Fourteenth Amendment in a school system maintained pursuant to state law. However, the holding in Brown was that the forced segregation of children in public schools solely on the basis of race, denied the children of the minority group the equal protection of the laws granted by the Fourteenth Amendment.
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> * * * *
>
> "We approve also of the statement in the District Court's opinion, 'Nevertheless, I have seen nothing in the many cases dealing with the segregation problem which leads me to believe that the law requires that a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites. . . .'"

To the same effect are Downs vs. Board of Education of Kansas City (10th Cir.), 336 F. 2d 988 (certiorari denied 380 U. S. 914, 13 L. Ed. 2d 800); Gilliam vs. School Board of the City of Hopewell, Virginia (4th Cir.) 345 Fed. 2d 325; Deal vs. Cincinnati Board of Education (6th Cir.) 369 Fed. 2d 55.

Congress deliberately and knowingly wrote the thrust of Bell vs. School City of Gary, Indiana, hereinbefore cited, into the Civil Rights Act of 1964, which is the very

Act under which the Respondent claims the right to file and maintain this suit for the purpose of enforcing it. This is shown by the opinion in United States, et al. vs. Jefferson County Board of Education, et al., 372 Fed. 2d 836, wherein the Court found from the Congressional history of the legislation, including the remarks of Senator Humphrey, the Floor Manager of the Civil Rights Act, that this was true. We quote from the Jefferson opinion beginning on page 881 as follows:

"Senator Humphrey explained:

> 'Judge Beamer's opinion in the Gary case is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute.'
>
> "The thrust of the Gary case (Bell) was that if school districts were drawn without regard to race, but rather on the basis of such factors as density of population, travel distances, safety of the children, costs of operating the school system and convenience to parents and children, those districts are valid even if there is a racial imbalance caused by discriminatory practices in housing. Thus, continuing his explanation, Senator Humphrey said:
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> "The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the schools. The natural factors, such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of Section 4.' ".

These pertinent provisions of the Civil Rights Act of 1964 are 42 U. S. C. 2000c (b), 2000c-6 (a) and 2000c-9 from which we quote the pertinent provisions in order:

"2000c. As used in this title—

"(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Sec. 2000c-6(a). ". . . nothing herein shall empower any official or court of the United States to issue any orders seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance."

Sec. 2000c-9. "Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

It appears both from the case law and from the Civil Rights Act of 1964 under which Respondent has filed this suit for the purpose of enforcing it that the Bankston zone is constitutionally valid and should have been approved by the Court of Appeals.

4. Teacher Desegregation.

Petitioners' hiring and contracting with teachers is governed by the mandatory provisions of two valid Mississippi statutes, sections 7 and 13 of Chapter 20 of the Laws of Mississippi, Extraordinary Session of 1953, which appear in the Mississippi Code of 1942 as sections 6282-07 and 6282-13 and copies of which are Appendix E hereto. They provide that teachers shall be hired by the principal of each school recommending to the superintendent of the district the teachers to be employed in the principal's school. The superintendent may either reject such recommendation or recommended the employment of the teacher to the school board. Then, unless good reason to the contrary exists, the school board shall elect the teachers so

recommended, and thereafter the superintendent shall enter into a contract with the teachers so selected. This contract is for the teacher to teach at the particular school of the principal who made the recommendation.

The record shows without dispute that the policy being followed by petitioners in hiring teachers is that race or color is not a factor in the employment, re-employment, hiring, rehiring, promotion, demotion, or dismissal of teachers. The specific steps taken by petitioners in the short time available to them in carrying out this policy appear in the record at pages 302 through 326.

We submit that the equal protection of laws of the Fourteenth Amendment to the Federal Constitution requires that this policy be continued, but that this is all that the Federal Constitution does require.

The decision of the Court of Appeals herein requires petitioners to abandon their policy of hiring teachers without reference to race or color and, instead, to balance the faculty in each of its schools with white and Negro teachers by hiring such teachers and by assigning its present teachers to different schools, and to do this on the basis of race and color and without reference to the lack of applicants for such teaching positions and without reference to the qualifications or lack of qualifications of such applicants as petitioners may secure in the future.

This will necessarily require petitioners to violate the equal protection clause of the Fourteenth Amendment which, as we understand it, makes unlawful a distinction on grounds of race or color in awarding state employment. Gibson vs. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075; Alston vs. School Board (4th Cir.), 112 F. 2d 992; Reynolds, et al., vs. Board of Public Instruction (5th Cir.), 148 F. 2d 754; Kerr, et al., vs. Enoch Pratt Free Library of Baltimore City, et al., (4th Cir.), 149 F. 2d 212.

In some cases at some schools it will require petitioners to refuse employment to white applicants on the sole ground that they are white, and in other cases at other schools it will require petitioners to refuse employment to Negro applicants on the sole ground that they are Negroes; and, unless sufficient vacancies should somehow occur in all of petitioners' schools before this judgment becomes effective, it will necessarily require petitioners to discharge and breach its contract with some white teachers on the sole ground that they are white and to discharge and breach its contract with some Negro teachers on the sole ground that they are Negroes.

The decision of the Court of Appeals herein necessarily deprives teachers and teacher applicants of the right given them by the equal protection clause of the fourteenth amendment not to be discriminated against by the state on account of their race or color.

The scarcity of applicants of the preferred races for these teaching positions is shown without dispute in the record at pages 292, 242-3, 259-68, 272-5 and 398. Presumably for the purpose of overcoming this lack of applicants, the decision of the Court of Appeals requires petitioners to attempt to transfer its teachers from the schools at which they applied and contracted to teach to other schools a which they have not contracted to teach and at which the record shows without dispute they refuse to teach. (R. 316-25, Ex. 8p492, 232-43, 259-63, 272-4.)

The teachers are not parties to this suit. They are not slaves, and neither petitioners nor the Court can compel them to work and teach where they refuse to teach. The Court has ordered petitioners with an injunction to perform something which is beyond their power to perform.

In addition, the contracts between this school district and its teachers for the teachers to teach at the specific school where they sought and obtained employment are valid contrasts, and under them petitioners have no legal

right to assign any teacher to any school other than the school in which she contracted to teach. It is obvious that if petitioners breach these contracts by trying to make a teacher, against her will, teach at a school other than the one in which she had contracted to teach, the petitioners would simply have to continue to pay her salary without her teaching, and, if it had sufficient funds, would have to try to contract with some other teacher to take her place.

We submit that if petitioners are permitted to pursue their policy of hiring teachers without reference to race, as is required by the Federal Constitution, then this will inevitably result in considerable mixing of teachers by race in all of the schools of the district. On the other hand, if petitioners are required to comply with the decision of the Court of Appeals, then the result will obviously be to run teachers out of its school system and to make such a shambles of the system that no one will be able to obtain an adequate education in it.

And, in addition, as to the Bankston School, it is our understanding that the reason back of the theory that teachers of different races should be in the same school is that this is the right of the pupils in that school. Inasmuch as the student body in the Bankston School is entirely white and make no complaint that their rights are violated by an absence of Negro teachers, we do not see how it can be held that the Constitution mandatorily requires that Negro teachers be placed in this school by the methods mentioned above. We submit that the Constitution requires that the teachers in this school, as in other schools, be hired without discrimination as to race, and that the decision of the Court of Appeals herein conflicts with the equal protection clause of the fourteenth amendment.

The Court of Appeals has decided a question of federal law which is of vital importance to school districts and school teachers and to the cause of education itself

throughout the United States. This question has not been, but should be, settled by this Court.

Respectfully submitted,

HARDY LOTT
Of LOTT, SANDERS & GWIN,
105 West Market Street,
P. O. Box 1176
Greenwood, Mississippi 38930
Counsel for Petitioners

CERTIFICATE OF SERVICE

The undersigned counsel of record for the petitioners hereby certifies that true copies of the foregoing petition have been this day deposited in a United States Post Office, with first class postage prepaid, separately addressed to each of the following: Hon. Stephen J. Pollak, Hon. Nathan Lewin, and Hon. Dorothy Battle Rankin, attorneys, Department of Justice, Washington, D. C. 20530, who are the attorneys for the Respondent herein, and Solicitor General, Department of Justice, Washington, D. C. 20530.

This the _____ day of April, 1969.

HARDY LOTT
Counsel for Petitioners.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25714

UNITED STATES OF AMERICA,
Appellant-Appellee,
versus
GREENWOOD MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL,
(AND REVERSE TITLE)
Appellees-Appellants.

Appeals from the United States District Court for the Northern District of Mississippi

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(February 4, 1969)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

THORNBERRY, Circuit Judge: At issue in this case is the school desegregation plan approved by the district court for the Greenwood Municipal Separate School District in Greenwood, Mississippi. Before evaluating the merits of the plan, we must pass on procedural questions raised by the distinguished counsel for the school district. First, he argues that the action should have been dismissed for the Government's refusal to produce any evidence to

establish its right to file suit under Section 407 of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6. Speaking exclusively to appellate jurisdiction, he argues that the Government cannot complain in this Court of an action taken by the district court at its own request. Specifically, the contention is that the Government should not be allowed to attack the adequacy of *Jefferson*-type freedom of choice and ask this Court to prescribe a new attendance plan when the *Jefferson* decree was approved by the district court on the Government's motion.[1]

Section 407[2] provides generally that when the Attorney General is satisfied he has received meritorious complaints

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[1] In September, 1966, the district court approved an attendance plan which combined freedom of choice and geographic zoning. In September, 1967, in response to the Government's motion, the freedom of choice provisions were amended in accordance with the *Jefferson* decree. This appeal is from the September, 1967 decision.

[2] 42 U.S.C. § 2000c-6:

> (a) Whenever the Attorney General receives a complaint in writing—
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> (1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or
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> (2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,
>
> and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings

from the parents of children in a school system to the effect that the children are being deprived by the school board of the equal protection of the laws and when he is further satisfied that the parents are unable to initiate legal proceedings themselves, he may, after notifying the school board of the complaints and issuing a certificate verifying the existence of the complaints, file suit in federal district court. In August, 1966, Attorney General Katzenbach issued the certificate required by the statute [3]

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instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

Persons unable to initiate and maintain legal proceedings

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standin of such person of persons, their families, or their property.

"Parent" and "complaint" defined

(c) The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001, Title 18. Pub.L. 88-352, Title IV, § 407, July 2, 1964, 78 Stat. 248.

[3] I, NICHOLAS deB. KATZENBACH, Attorney General of the United States, hereby certify that I have received complaints in writing signed by parents of minor children in the City of Greenwood and in Leflore County, Mississippi, alleging in effect that said children are being deprived by the Greenwood Municipal Separate School District and the Leflore County School District of the equal protection of the laws; that I believe the complaints to be

and filed suit in the court below. The school board filed an answer in which it denied that any children in the system were being deprived of equal protection of the laws. In addition, it filed interrogatories and a motion to produce under Rules 33 and 34 in order to elicit the names of the complainants and the precise nature of their complaints. In essence, these motions were designed to test the validity of the Attorney General's certificate. But the trial judge said he did not believe Congress intended the certificate to

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meritorious; that the signers of the complaints are unable, in my judgment, to initiate and maintain appropriate legal proceedings for relief; that the Boards of Trustees of the School Districts were notified of the complaints; and that in my judgment, the institution of this action a reasonable time to adjust the conditions alleged in the complaints; and that in my judgment, the institution of this action will materially further the orderly achievement of desegregation in public education.

This certificate is made pursuant to the provisions of 42 U.S.C. 2000c-6(a), in support of the complaint to which it is attached.

Signed this 28th day of July, 1966.

/s/ Nicholas deB. Katzenbach
NICHOLAS deB. KATZENBACH
Attorney General

A supplemental Certificate of the Attorney General was filed with the district court on August 22, 1966:

I, Nicholas deB. Katzenbach, Attorney General of the United States, hereby certify that the signers of the complaints described in my Certificate filed heretofore in this action, are unable, in my judgment, to institute and maintain appropriate legal proceedings for relief because they are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; and I am satisfied that the institution of such litigation would jeopardize the personal safety and economic standing of such persons, their families, and their property.

This Supplemental Certificate is made pursuant to the provisions of 42 U.S.C. 2000c-6(a), in support of the complaint filed heretofore in this action.

Signed this 18th day of August, 1966.

/s/ Nicholas deB. Katzenbach
NICHOLAS deB. KATZENBACH
Attorney General

be subject to judicial review and therefore sustained the Government's objections to the motions.

The legislative history of section 407 supports the court's ruling:

> As a prerequisite to suit, the Attorney General would be required to certify that the signers of the complaint were "unable to initiate and maintain appropriate legal proceedings" for relief, and that the institution of an action would materially further the public policy favoring the orderly achievement of desegregation in public education. *It is not intended that determinations on which the certification was based should be reviewable.* [H.R. Report No. 914, 88th Cong., 1st Sess., pp. 23-24, 1964 U.S. Code Congressional and Administrative News, at 2355, 2399 (emphasis added)].

Senator Humphrey, the floor manager of the bill in the Senate, added:

> The bill requires the Attorney General to state in his complaint that he has received a complaint and that in his judgment the persons who complained are unable to initiate or maintain appropriate legal proceedings. *These statements by the Attorney General will not be subject to challenge either by the defendants or by the court. Under no circumstances will the Attorney General be required to reveal the names of the particular complainants.* [110 Cong. Rec. 6543 (March 30, 1964) (Emphasis added).]

While conceding that this legislative history may preclude discovery of the complaints' names and make unassailable the assertion that they are unable to initiate and maintain legal proceedings for themselves, the school board contends that the nature of the complaints should nevertheless be discoverable. However, the portion of the House Report cited above conveys the broad implication that none of the determinations on which the Attorney General's certificate is based were intended to be reviewable. In order

to assure the anonymity of the complaining Negro parents, Congress vested authority in the Attorney General to make a final determination as to whether the complaints he receives merit legal action, whether the complainants would be unable to initiate a suit themselves, and whether a suit would advance the desegregation of schools. Having issued a certificate in conformity with the statute, he acquires standing to sue. If it develops that no children in the school district are being denied equal protection of the laws, then no relief will be granted. This was the position taken by the court below and by another district court which considered the same question. *See United States* v. *Junction City School District*, W.D. Ark. 1966, 253 F. Supp. 766. We agree.

In urging that disclosure should have been required or else the suit dismissed, appellant points out that the Attorney General must certify that the school district has "had a reasonable time to adjust the conditions alleged in the complaints." How, queries counsel, can he truthfully make such an assertion when he has prevented the school district from even attempting to adjust conditions by refusing to disclose the names of the complainants and the nature of their complaints? If disclosure were required, the school board might be able to make proper adjustments and thus avoid an expensive, time-consuming lawsuit. The answer to this argument is that disclosure of the names of the complainants and the exact language of their complaints is unnecessary because the school board knows, has known since 1954, what Negro parents mean when they alleged generally that their children are being denied equal protection of the laws. They mean that all-Negro schools yet exist, that faculties have not been integrated, and that other characterisics of the dual system remain. When the Attorney General certifies that in his opinion the school district has had a reasonable time to adjust the conditions complained of, he means simply that in all these years the school district has not made enough progress toward estab-

lishing a unitary nondiscriminatory system. The school board cannot adjust conditions and avoid the lawsuit by negotiating with the particular parents who have complained. Seeing their names and the precise language of their complaints will not give the board any information it cannot get by looking at conditions in the schools, specifically at the extent of desegregation of students, teachers, and activities. The progress of desegregation is what school cases are all about; the school board knows this and does not need to examine the complaints received by the Attorney General to know what is being charged. If the board is convinced the lawsuit is without redeeming merit, it can offer objective evidence to this effect. Again, we hold that the board has no right, nor have the courts any right, to examine the information which triggered the Attorney General's certificate.[4]

We turn now to the school board's contention that the Government should not be heard to challenge the adequacy of freedom of choice when the model decree for freedom of choice was entered on its own motion. As the board says, the Government urged the adoption of the model decree for freedom of choice in the court below but now takes the position that freedom of choice should be abandoned in favor of some other attendance plan because it has not brought about an acceptable degree of integration. For

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[4] We have found no case holding that the Attorney General's suit is subject to a motion to dismiss where he refuses to disclose information underlying his certificate. However, in *United States* v. *School District Number 1, Lexington County*, D. S.C. 1966, 40 F.R.D. 391, a district court held that the names of the complainants and the nature of their complaints could be discovered in preparation for trial. Though the court agreed that such information is not discoverable on a motion to dismiss, we nevertheless have grave doubts about the decision for the reasons stated in the text of this opinion. Congress has clearly expressed its concern with assuring anonymity to the complainants, and we cannot see how their names and the nature of their complaints can be essential to the school board's preparation for trial. The board has all necessary information about its schools in its own files or can readily obtain such information without having to see the complaints.

the proposition that where freedom of choice has not worked it must give way to a different attendance plan, the Government relies on Supreme Court cases decided after the district court's decision in this case. *See Monroe* v. *Board of Commissioners of the City of Jackson*, 1968, 88 S.Ct. 1701; *Raney* v. *Board of Education of Gould School District*, 1968, 88 S.Ct. 1697; *Green* v. *County School Board of New Kent County*, 1968, 88 S.Ct. 1689.[5] As we understand the school board, it does not deny that its future litigation must be governed by *Green* and *Raney* but it does contend that on this appeal the Court is no position to prescribe a particular attendance plan to replace freedom of choice. We agree that the posture of the case is such that we cannot prescribe a particular plan to be implemented by the district court and the school board. But since the case is properly before us and since we must remand for reasons quite apart from the inadequacy of freedom of choice, we hasten to emphasize that on remand the proceedings must be controlled by *Green* and *Raney*, as well as recent Fifth Circuit decisions. Going a step further, we will express the view that these recent decisions foreclose the use of freedom of choice in *Greenwood* because it has produced so little in the way of meaningful desegregation. On remand, of course, the school board will have an opportunity to be heard as to the attendance plan it considers most desirable. It is our impression that in objecting to the Government's appeal from that part of the district court's decision granting the relief for which it asked, the school board is primarily concerned that it be given a hearing on the matter of the appropriate attendance plan before a decision is made. It does have a right to such a hearing.

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[5] Prior to the Supreme Court decisions in *Green* and *Raney*, this Court made it clear that freedom of choice is not an end in itself, so that if it does not work, another attendance plan must be tried. *Davis* v. *Board of School Commissioners of Mobile County*, 5th Cir. 1968, 393 F.2d 690, 695; *United States* v. *Jefferson County Board of Education*, 5th Cir. 1967, 380 F.2d 385, 390.

School Desegregation in Greenwood

A. *Students.* Greenwood is a town of about 25,000 people with about as many Negroes as whites. In the 1967-68 school year, there were about 3,000 white students and 3,000 Negroes in the school system. There are five elementary schools, two junior high schools, and two senior highs. Under the plan approved by the district court, attendance is based on freedom of choice in all of the schools but one. The one exception to the general pattern is a geographic zone approved for a white residential section in the north part of town. The zone is bounded on the north by the Tallahatchee River and on the south by the Yazoo River. It is connected with the main business district of Greenwood by three bridges crossing the Yazoo. All children of elementary school age who live in this residential district must attend the Bankston Elementary School; they cannot go elsewhere. All other schools in the system are south of the Yazoo so that junior and senior high school children who live in the zone are under the free-choice plan. Elementary school children who live south of the river, not in the zone, cannot go to Bankston. It is an all-white school, students and faculty.

The 1967-1968 figures for student enrollment indicate that of the eight schools operating under freedom of choice there were two all-Negro elementary schools, one all-white elementary school, one all-Negro junior high, and one all-Negro senior high. The three remaining schools (elementary, junior high, and senior high) were overwhelmingly white but had a total of 18 Negroes enrolled. Thus, only 18 Negroes, less than 6% of the Negro student population, experienced a desegregated education last year while the remainder attended all-Negro schools.[6] In the previous

[6] The Government has included in its brief 1968-69 enrollment statistics which indicate that the number of Negroes enrolled in predominantly white schools has increased from 18 to 51 or from .6% to about 1.8% of the Negro students. These statistics also indicate that there are still two all-Negro elementary schools, one

year, 1966-67, only 9 Negro students attended predominantly white schools in the free-choice area south of the Yazoo. As this Court said in a recent school desegregation case, "figures speak and when they do courts listen." *United States* v. *Board of Education of Bessemer*, 5th Cir. 1968, 396 F.2d 44, 46. Looking at these enrollment figures for the two previous school years, we cannot escape the conclusion that freedom of choice has not been successful in bringing about a transition to a unitary nondiscriminatory school system. In holding that freedom of choice was an unacceptable attendance plan for New Kent County, Virginia, the Supreme Court in *Green* noted that after three years under freedom of choice 85% of the Negro children in the system still attended the all-Negro school. The statistical showing in Greenwood has been much worse; therefore freedom of choice must be abandoned in favor of some other plan that "promises realistically to work and promises realistically to work now." 88 S.Ct. at 1694. As we have said we will not at this time dictate the plan to be used, but it is abundantly clear that freedom of choice cannot be used since it has not done the job that is constitutionally required, *i.e.*, the job of converting a dual system into a unitary system in which the separate tracks for Negro and white students are no longer identifiable.

Although it is true that the Government asked for the freedom of choice decree and did not object to it until reaching the appellate level, it has objected all along to the geographic zone on which the district court placed its imprimatur. That zone covers an all-white residential

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all-Negro junior high and one all-Negro senior high. The school board protests that these figures were compiled after the district court's decision in this case and therefore are not properly a part of the appellate record. The figures were in a report filed by the school board with the district court on June 1, 1968. We think we could properly consider a public record of this kind, but, at any rate, the figures for 1967-68 adequately portray the lack of desegregation under freedom of choice.

district, and the Bankston Elementary School has always been an all-white school. In evaluating the school board's approach to school desegregation, we must pass on the validity of the Bankston zone as well as the validity of the freedom of choice plan that has governed students who must attend schools south of the Yazoo. The court below held that the board had drawn the most natural geographic zone imaginable: It is bounded by river on the north and south and, if elementary school children were to attend some school other than Bankston, they would have to go over a bridge and through the business section of town. We acknowledge that there is a rational basis for the geographic school zone in North Greenwood; moreover, we have previously held that in many instances geographic zoning offers both administrative improvement and greater desegregation. *See Davis* v. *Board of School Commissioners of Mobile County*, 5th Cir. 1968, 393 F.2d 690. However, geographic zoning, like any other attendance plan adopted by a school board in this Circuit, is acceptable only if it tends to disestablish rather than reinforce the dual system of segregated schools. In *Davis*, for example, we concurred in the school board's use of zoning but required the board to make a new effort to draw zone lines on a nonracial basis so that its plan would promote desegregation rather than perpetuate segregation. 393 F.2d at 694. In this case, the Bankston zone has never even had the potential of promoting desegregation because it covers an all-white residential section. Hence, that zone must be re-evaluated along with the freedom of choice provisions of the board's attendance plan.

Counsel for the school board argues that a geographic zone does not contravene the fourteenth amendment if it is drawn according to objective criteria and not along racial lines. This assessment of the equal protection clause as it applies to school desegregation fails to take into account the *affirmative duty* of school boards in this Circuit to abolish state-compelled educational segregation and establish in its place a unitary system. This affirmative

duty was spelled out in *Jefferson* and reaffirmed in *Green* and *Raney*. In saying that the board's attendance plan must fulfill its affirmative duty to desegregate, we do not mean that the Bankston School, standing alone, is constitutionally defective because it is all-white or that Negro children of elementary school age have a constitutional right to attend the Bankston School in particular. The problem is that neither the Bankston zone nor the freedom of choice plan for students attending the other eight schools has contributed to desegregation. The over-all plan is defective and must give way to something new.

We do not rule out geographic zones for Greenwood, nor do we say that the Bankston zone will not fit into a valid over-all plan. We do say that a new plan must be devised to eliminate the remaining, glaring vestige of a dual system: The continued existence of all-Negro schools with only a fraction of Negroes enrolled in white schools. It may be that district-wide, nonracial zone lines would accomplish full conversion to a unitary system by giving all Negro students a desegregated education. Or, if this should be deemed inadequate, the combination of geographic zones with a majority-to-minority transfer policy can be considered. There are various possibilities. *See, e.g.*, *Adams* v. *Matthews*, 5th Cir. 1968, —— F.2d —— [No. 26501, August 20, 1968]; *Board of Public Instruction of Duval County* v. *Braxton*, 5th Cir. 1968, 402 F.2d 900. We leave initial determination to the district court.

B. *Faculty.* The record reflects that as of the beginning of the 1967-68 school year there were three white educators and one white nurse employed by all-Negro schools. This was the extent of faculty and staff desegregation in Greenwood. We understand that our decree will not be simple of compliance, but we must apply the same rule of law to Greenwood that we have applied to so many other school districts: The school board must put its shoulder to the wheel and assume the burden on integrating the faculty and staff of each school, including Bank-

ston.[7] The transformation to a unitary system will not come to pass until the board has balanced the faculty of each school so that no faculty is identifiable as being tailored for a heavy concentration of Negro or white students. *See, e.g., Montgomery County Board of Education* v. *Carr*, 5th Cir. 1968, 400 F.2d 1; *United States* v. *Board of Education of Bessemer*, 5th Cir. 1968, 396 F.2d 44; *Davis* v. *Board of School Commissioners of Mobile County, supra; Stell* v. *Board of Education for the City of Savannah*, 5th Cir. 1967, 387 F.2d 486; *United States* v. *Board of Education of Jefferson County, supra.* This ultimate goal of balancing each faculty so that it cannot be identified as tailored for students of a particular race must be reached by the start of the 1970-71 school year. *United States* v. *Board of Education of Bessemer, supra.* To assure compliance, it is evident that the district judge will have to impose interim targets and conduct subsequent hearings to determine what progress is being made.

The school board protests that it is powerless to do what we ask because of state laws. Under these laws, the principal of each school is responsible for hiring his own teachers though the superintendent and school board must approve their contracts. Of course, one answer to the argument that state laws prevent the board from taking the necessary affirmative steps is that local teacher hiring statutes may not be interposed to frustrate a constitu-

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[7] Counsel suggests that Bankston Elementary School should not be subject to any faculty integration because it has an all-white student body as a result of a de facto housing pattern. Bankston, however, is part of a formerly de jure dual segregated school system. The school board has an affirmative duty to eradicate the effects of past discrimination in that system. As we have stressed before, a vitally important step toward achieving this goal is the integration of each school's faculty so that no faculty will be identifiable as being tailored for a heavy concentration of white or Negro students. Thus, the faculty at Bankston, like the other faculties, must not be recognizable as being tailored for students of a particular race. The board cannot, by its failure to integrate the faculty, set the school up as a haven for white students.

tional mandate. *United States* v. *Board of Education of Bessemer*, 396 F.2d at 51. Moreover, it will not be inconsistent with the Mississippi statutes for the school board to withhold final approval of teacher contracts unless such contracts will help achieve teacher desegregation. This was the relief requested by the Government in the court below, but the court's final decree merely gave the board the option of withholding approval of contracts in order to achieve desegregation. The board's responsibility is not optional: it must withhold approval of contracts if necessary to achieve faculty desegregation.

The board further protests that it cannot achieve faculty desegregation by transferring teachers to different schools because under state law teacher contracts are for specific schools, thus making the reassignment of a teacher a breach of contract. Again, however, a state law is invalid to the extent that it frustrates the implementation of a constitutional mandate. This is the position the board must take if it is faced with lawsuits brought by teachers who have been reassigned and are alleging breach of contract. But it is hoped that such confrontations can be avoided by cooperation on the part of teachers and by the recruiting and hiring of teachers with an eye toward faculty desegregation.

The judgment of the court below is REVERSED and the case REMANDED for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25714

D. C. Docket No. GC 6640

UNITED STATES OF AMERICA,
Appellant-Appellee,

versus

GREENWOOD MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL,
(AND REVERSE TITLE)
Appellees-Appellants.

Appeals from the United States District Court for the Northern District of Mississippi

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Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is

hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees-appellants, Greenwood Municipal Separate School District, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 4, 1969

Issued as Mandate:

[324] Thornberry

U. S. Court of Appeals, Filed March 5, 1969
Edward W. Wadsworth, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25714

UNITED STATES OF AMERICA,
Appellant-Appellee,

v.

GREENWOOD MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL,
(AND REVERSE TITLE)
Appellees-Appellants.

Appeals from the United States District Court for the Northern District of Mississippi

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(March 5, 1969)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

APPENDIX B

MEMORANDUM OPINION AND ORDER

(Number and title omitted) (Filed:)

This case is before the court following a hearing which resulted from a motion filed by plaintiff for supplemental relief with respect to the desegregation of the public school system operated by the defendant municipal separate school district. A desegregation plan as submitted by defendants was approved by this court on September 2, 1966, with certain modifications thereof which are of record in said order.

Defendants operate nine school plants, five of which are elementary schools, two are junior high schools, and two are high schools. The plan as approved is basically a freedom of choice program for all schools within the system except there is a geographic attendance zone for the Kathleen Bankston Elementary School. The use of this attendance zone for that school was approved by this court in its said order only for the first semester of the 1966-1967 school year. That approval was coupled with a provision that plaintiff could seek upon proper motion a fuller evidentiary hearing for a reconsideration or modification of that approval. But as the Fates would have it, no such hearing was had until after the second semester for this school was under way.

In essence plaintiff seeks now to invalidate the geographic attendance zone for the Bankston Elementary School and to require the defendants to give notice to the parents of all students in grades 1 through 6 of their right to apply now for transfer for their child during the second semester of this school year to the Bankston School.

1) The Bankston School geographic attendance zone is, as this court believes, as natural an area for such a zone as could be found. It is bounded on the north by one

river; on the south by another, on the opposite bank of which the central business district of the City of Greenwood extends substantially across the east-west length of the district; on the east by the two rivers whose confluence forms the eastern-most part of the zone, and on the west by the boundary of the school district which is at a place where the two rivers are closer than at any other point across the zone except slightly west of where they join.

There are only two bridges across this southern-most river, along the south of this zone, and both of them are into the central business district aforementioned. This is a city of about 25,000 population and these two bridges carry heavy loads of traffic, especially during the busy hours. One such busy period would be that preceding the normal time for the opening of schools everywhere in the morning.

Historically, well before this school system or any other school system was faced with desegregation by reason of federal law, this same area had been established as an attendance zone for this elementary school plant. In 1951 the old plant was abandoned and the present plant was constructed near the northern boundary of this zone in answer to rather rapid residential construction and expansion in this zone and in preparation for expansions of residential areas which then could be foreseen for the future. It is essentially a residential area and there have been many new residential subdivisions developed there in recent years.

One of the historic reasons for the establishment of this area as an attendance zone many years ago was that parents who lived in this area who had school children attending grades above grade 6 and who also had children attending schools in grade 6 and lower wanted the younger children to go to elementary school in the vicinity of the junior high school or the high school attended by the older children as a matter of family convenience. If this had

been permitted, an overload would have occurred in the other elementary schools.

If a combination of geographic zoning and freedom of choice is constitutionally permissible within a single school system, this zone, it is believed, would pass every test. But this is the principal point about which this court is concerned on this submission. It needs more careful and more mature consideration before final disposition is made, and the parties will be directed to brief this point to permit its further consideration.

2) But, plaintiff seeks to buttress its claim for the "wholesale" notice to parents and the possibility that there might be "wholesale" applications for transfer now to the Bankstan School by pointing out some apparent discrepancies in teacher-pupil ratios as between the elementary schools of this district. In Bankston this year there are 27 pupils per teacher, while in Stone, formerly all Negro, there are 31.4 . Two other elementary schools, formerly all white, Williams and Davis, per teacher have 23.9 and 27 pupils respectively. These figures, unfortunately, are for school. They are not broken down either into grades or into classes within grade, and it is not unusual for there to be a significant difference in teacher-pupil ratio as between grades in a given school or even as between classes in a given grade in a particular school. Thus, these figures, in their raw state, cannot give much comfort to plaintiff at this time. This is especially true when the present over-staffing—if such it be—at the Bankston School was occasioned by the formation of a private school to which a number of pupils who could otherwise have been expected to attend this year at Bankston are now going. And, additionally, if these figures have any validity, there are two other elementary schools in this system south of the river which have as good or better teacher-pupil ratios than does Bankston to which application could have been made during the freedom of choice period for any child of elementary school age living south of the river.

3) Additionally, it must be borne in mind that there is a built-in rigidity in the operation of any school system by any public agency anywhere in the United States. For Mississippi schools, such as the defendant school district, planning for the next school year must be started in the current year and reasonably valid estimates of school populations for each of the school plants and each of the schoolrooms in each of the school plants must be made. From them teaching and other staffs must be programmed and projected into the next year. All of this had been done before this suit was filed and there was little flexibility available to defendants to rearrange or to redeploy their staffs after this litigation developed. This is especially true since applications for teaching positions are made to the principal of a school and no teacher can be employed except upon his recommendation. Moreover, budgets are developed and approved during the summer and there is little, if any, authorization to obtain any additional money from county and state sources for the operation of a school system after submission and approval of the budget for a given school year.

4) Consideration must also be given to the fact that the second semester of this school system is now under way. Each class has been organized, each pupil assigned to a given class, and teachers have been assigned to specific classes and specific work for the rest of this school year. It also must be borne in mind that there is no evidence now before the court that any application to attend Bankston School has been made for any child living outside this zone and no evidence that there is any parent of any child living outside this zone who wishes to send a child to this school.

5) In these circumstances, it would, as this court believes, be improvident and not in the best interests of the school children of this school district to undertake any radical or drastic rearrangement at this time.

For the foregoing reasons, it is,

ORDERED:

1) The geographic attendance zone for the Kathleen Bankston Elementary School shall be and is hereby approved for use during the remainder of the school year 1966-1967, but final disposition of the question as to whether a combination of geographic zoning and freedom of choice is constitutionally permissible or not is reserved for later disposition and a briefing schedule will be separately established for that purpose.

2) Plaintiff's motion for supplemental relief shall be and is hereby denied and overruled, but without prejudice to the right to seek any and all of the relief thereby sought at a later time.

This the 7th day of February, 1967.

/s/ CLAUDE F. CLAYTON
CLAUDE F. CLAYTON,
District Judge

APPENDIX C

Received Sept. 5, 1967

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
Post Office Box 220
Tupelo, Mississippi 38801

Chambers of
Claude F. Clayton
Chief Judge

September 1, 1967

Honorable Hardy Lott
Attorney at Law
Post Office Box 1176
Greenwood, Mississippi 38930

Honorable Dorothy Battle Rankin, Attorney
United States Department of Justice
Washington, D. C. 20530

Honorable J. Harold Flannery, Attorney
United States Department of Justice
Washington, D. C. 20530

Honorable H. M. Ray
United States Attorney
Post Office Box 191
Oxford, Mississippi 38655

Honorable Will S. Wells
Assistant Attorney General
State of Mississippi
Jackson, Mississippi 39205

Re: United States v. Greenwood Municipal Separate School District, et al, No. GC6640

Miss Rankin and Gentlemen:

School openings which, as I understand, are scheduled for next week require that I make disposition of the pend-

ing motions at this time. This letter will serve that function.

Time does not permit nor circumstances require any detailed expression from me. Therefore, I will limit this letter to a statement of my views which I consider necessary to an understanding by counsel of what I am doing. For ease of reference, the paragraphs following will be numbered.

1) I have concluded that a combination of an attendance zone for the Bankston School with freedom of choice to apply elsewhere in the school district is constitutionally acceptable. Some of the facts supporting this conclusion are stated in my memorandum opinion and order of February 7, 1967. Hence, this combination is approved.

2) The time within which choice of schools could be exercised last spring was too short. However, the high percentage of choice forms which were returned persuades me to the view that no complete new choice period is required for the school year 1967-1968, and the choices made last spring are accepted, subject to these modifications:

a) For the first ten classroom days, a choice of schools will be made by or for any pupil for or by whom no choice theretofore had been made.

b) During that same period of time, any choice theretofore made for or by any pupil may be changed.

c) Choices made under the provisions of a) and b) will be subject to the other provisions of the "*Jefferson*-type" decree which will be entered with the modifications directed by this letter.

d) Notice of these arrangements will be prominently posted on the pupil bulletin boards in each attendance center, except Bankston, and each homeroom teacher in each attendance center will announce this choice period to each class at least twice.

e) Choice forms as used last spring will be acceptable for use in recording the choices made during the aforementioned period.

f) Defendants will give such assistance as may be necessary to make choices made during said period administratively effective.

3) Paragraph II(c) will be modified to deal only with choice periods for the school year 1968-1969 and thereafter.

4) Paragraph II(d) will be modified by deleting the last sentence.

5) Inasmuch as the evidence conclusively shows that delivery of the letters of explanation and choice forms to pupils for delivery to their parents (or other who might stand in the position of a parent) and the delivery of report cards and other announcements have all been administratively effective, it is considered that the expense of mailing of explanatory letters and choice forms would be, for this school system, an unnecessary expense. Paragraph II(f) will be modified to delete the mailing requirement and to require delivery to the pupil, with a receipt to be signed by the adult receiving the letter and the form, and returned promptly to the school by the pupil.

6) Paragraph VIII will be modified in the same way (with such obvious changes as are proper in titles) as was this paragraph in the decree entered in GC6640A (Leflore County).

7) All the foregoing references to paragraphs are to the paragraphs of the decree proposed by plaintiff in this case.

8) Because of the press of time, limitations of my clerical staff and work load, counsel are directed to prepare a decree for entry in accordance with this letter. The Xerox copies of plaintiff's proposed decree may be used as far as appropriate. However, pending preparation of this

decree in final form, defendants may act upon the basis of this letter.

I apologize for the delay in dealing with these matters. I can only say that I have had, since submission of this case, a staggering work load and, additionally, that the issues in this case have been quite difficult for me to resolve.

With best wishes and personal regards, I am

Sincerely,

/s/ CLAUDE F. CLAYTON
CLAUDE F. CLAYTON

APPENDIX D

42 U.S.C. § 2000c-6:

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitution-

al standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

Persons unable to initiate and maintain legal proceedings

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

"Parent" and "complaint" defined

(c) The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001. Title 18. Pub. L. 88-352, Title IV, § 407, July 2, 1964, 78 Stat. 248.

APPENDIX E

Sections 6282-07 and 6282-13 of Mississippi Code of 1942.

§ 6282-07. Principal to recommend teachers—approval —Contract.—On or before April 1st of each year, the principal of each school shall recommend to the superintendent of the school district the teachers to be employed for the school involved except those teachers who have been previously employed and who have a contract valid for the ensuing scholastic year. If such recommendations meet with the approval of the superintendent, he shall recommend the employment of such teachers to the board of trustees of the district, and, unless good reason to the contrary exists, the board of trustees or other governing body shall elect the teachers so recommended. If, for any reason, the board of trustees shall decline to elect a teacher or teachers so recommended, additional recommendations for the places to be filled shall be made by the principal to the superintendent and then by the superintendent to the board of trustees as provided above. When the teachers in a county-wide or municipal separate school district have been elected as provided in this section, the superintendent of the district shall enter into a contract with such teachers in the manner provided in this act.

§ 6282-13. Contracts—form—execution.—The county superintendent of education shall enter into a contract with each superintendent, principal and teacher elected and approved for employment in the county school system, and the superintendent of the municipal separate school district shall enter into a contract with each principal and teacher elected and approved for employment in the municipal separate school district system. Such contracts shall be in such form as shall be prescribed by the state board of education and shall be executed in duplicate with one copy to be retained by the county superintendent or municipal separate school district superintendent, as

the case may be, and one copy to be retained by the superintendent, principal or teacher contracted with. The contract shall show the name of the school, the length of the school term, the position held, whether a superintendent, principal or teacher, the number of scholastic years which it covers, the total amount of the annual salary and how same is payable. If the salary is to be paid from two or more separate funds then the amount of salary payable from each fund school be separately stated in such contract, in addition to the total salary to be paid. The amount of salary to be shown in such contract shall be the amount which shall have been fixed and determined by the board of trustees of the school district, but, as to teachers paid in whole or in part with minimum education program funds, such salary shall not be less than that required under the provisions of Senate Bill No. 1205 (ch 14) Extraordinary Session of 1953 (§§ 6248-01 et seq). If any superintendent, principal or teacher, who has been elected and approved, shall not execute and return the contract within ten days after same has been tendered to him for execution, then, at the option of the board of trustees of the district involved, the election of the teacher and the contract tendered to him shall be void and of no effect.

APPENDIX F

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.